

Service Date: June 1, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE COMPLAINT OF)	
Gerald S. Maykuth,)	
)	UTILITY DIVISION
Complainant,)	
)	
-vs-)	DOCKET NO. 93.4.12
)	
U.S. West Communications, Inc.,)	
)	ORDER NO. 5791
Defendant.)	

FINAL ORDER

Procedural Background

1. On April 1, 1993 Gerald S. Maykuth (Complainant) filed a formal complaint with the Montana Public Service Commission (Commission) against U S West Communications (USWC). The Commission issued a Notice of Complaint on May 4, 1993. USWC filed an Answer to the Complaint and a Motion to Dismiss, on May 24, 1993.

2. On November 3, 1993 a Prehearing Scheduling Conference was held. On November 9, 1993 a Notice of Staff Action was served, setting a prehearing procedural schedule.

3. Complainant submitted Data Requests to USWC on November 29, 1993. USWC submitted Data Requests to Complainant on the same day. On December 13, 1993 USWC filed an objection to Complainant's Data Request GSM-8. On December 20, 1993 USWC filed responses to Complainant's Data Requests GSM-1 through GSM-7, GSM-9 and GSM-10. The Complainant filed a response to USWC's

objection to GSM-8 on January 6, 1994. USWC filed a reply thereto on January 27, 1994. Complainant also requested further answers to other Data Requests in his filing of February 14, 1994.

4. USWC filed a Supplemental Motion to Dismiss on January 21, 1994. Complainant filed a Reply and a Request for Summary Judgment on February 14, 1994. USWC filed a final Reply on February 23, 1994.

5. The Commission held a work session to consider the pending motions in this case on May 2, 1994.

Discussion and Decision

6. This Complaint arose from USWC's provision of new service to the Complainant's residence north of Helena in May of 1992. USWC could have provided service to the Complainant by extending its facilities from Green Meadow Drive or from Lincoln Highway. USWC chose to extend its facilities from Lincoln Highway, allegedly pursuant to its long-range plan. If USWC had used the Green Meadow route, it could have shared a trench with Montana Power Co., and Mr. Maykuth would have saved \$690 (1,380 feet x .50 cents/foot) on his MPC installation (the amount MPC billed USWC for use of the shared trench would have been deducted from his total MPC installation bill). The Complainant requests relief in the sum of \$690 from USWC.

7. The Commission will first address the Motion to Dismiss filed by USWC and the Motion for Summary Judgment by Complainant. USWC contends that the Complaint should be dismissed for failure

to state a claim upon which relief may be granted. See Rule 12(b)(6), M.R.Civ.P. The Complainant requests summary judgment in his favor, as a matter of law. See Rule 56, M.R.Civ.P.

8. The Commission has thoroughly examined the pleadings and all documents submitted in this case. A fundamental requirement of civil pleading practice is that the complainant/plaintiff express a theory or claim by which he is entitled to relief, or, in other words, that a claim be enunciated that the defendant has breached or violated some existing legal duty owed to the complainant/plaintiff. See Hasbrouck v. Krsul, 541 P.2d 1197, 168 Mont. 270 (1975). The Commission, in examining the record herein, is unable to identify any such claim by Complainant. It has not been alleged that USWC violated any applicable state statute, Commission rule, or any USWC service tariff. Therefore, under any possible set of facts, the Commission would be unable to grant any relief to the Complainant. Therefore, USWC's Motion to Dismiss is granted, and the Complaint dismissed.

9. Accordingly, the Complainant's Motion for Summary Judgment is denied. In light of these rulings, the other outstanding objections and motions regarding discovery are moot.

CONCLUSIONS OF LAW

1. USWC is a public utility offering regulated telecommunications services in the State of Montana. § 69-3-101, MCA. The Commission has authority to supervise, regulate and control public utilities. § 69-3-102, MCA.

2. The Commission properly exercises jurisdiction over USWC's Montana operations pursuant to Title 69, Chapter 3, MCA.

3. The Commission has the authority to hear, investigate and decide complaints filed by persons against public utilities. § 69-3-321, MCA

4. The PSC has provided adequate public notice of all proceedings herein and an opportunity to be heard, to all interested parties in this Docket. Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

ORDER

IT IS HEREBY ORDERED THAT the Complaint filed by Mr. Gerald S. Maykuth herein is hereby dismissed. This Docket is closed.

Done and Dated this 23rd day of May, 1994 by a 4 - 1 vote.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

Bob Anderson

BOB ANDERSON, Chairman
(Voting to Dissent)

Bob Rowe

BOB ROWE, Vice Chairman
(Separate Concurring Opinion)

Dave Fisher

DAVE FISHER, Commissioner

Nancy McCaffree

NANCY MCCAFFREE, Commissioner

Danny Oberg

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

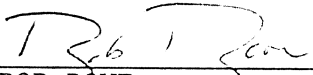
OPINION OF COMMISSIONER ROWE

Docket No. 93.4.12, Order No. 5791

The Commission was sympathetic to Mr. Maykuth's claim. However, review demonstrated that US WEST was in compliance with its filed tariff. Although not reflected in this order, Commissioners did express interest in considering whether tariffs should include provisions along the lines suggested by Mr. Maykuth.

The Commission's decision obviously will be unsatisfactory to the complainant. However it is fairer to dismiss a claim when it becomes apparent that there is no legal possibility of an eventual favorable outcome than it would be to prolong the matter, giving the claimant an unrealistic belief that he might eventually prevail.

RESPECTFULLY SUBMITTED this 23rd day of May, 1994



BOB ROWE
Vice Chair